BANK BUMIPUTRA MALAYSIA BHD A

v.

EMAS BESTARI SDN BHD & ANOR AND ANOTHER APPEAL B

COURT OF APPEAL, PUTRAJAYA
ABDUL WAHAB PATAIL JCA
BALIA YUSOF WAHI JCA
TENGKU MAIMUN JCA
[CIVIL APPEALS NO: W-02-2890-2010 & C
W-02-2886-2010]
3 OCTOBER 2013

CIVIL PROCEDURE: *Appeal - Assessment of evidence - Whether trial judge failed to consider certain evidence - Whether trial judge would* D
have come to different conclusion if evidence considered

CIVIL PROCEDURE: *Pleadings - Facts not pleaded - Whether objection that facts not pleaded could be sustained - Whether party making objection had opportunity to address truth and accuracy of facts - Whether* E
evidence was before court - Whether objection purely question of law

EVIDENCE: *Documentary evidence - Admissibility of - Computer generated document - Whether accompanied by certificate under s. 90A Evidence Act 1950 - Whether document admissible*
F

Emas Bestari Sdn Bhd ('Bestari') obtained a loan of RM500,000 from Mayban Finance Bhd ('MFB') guaranteed by its directors ('the guarantors'). The cheque for the loan sum was released to one Zauwiah Dahlan ('Zauwiah') into an account in Bank Bumiputra Malaysia Bhd ('BBMB') under the name of Bestari. G
The money was taken out of the account three days later. Bestari and the guarantors contended that: (i) MFB had wrongly released the cheque for the loan to Zauwiah; and (ii) BBMB had wrongly opened the account for Bestari as it was without their authority and knowledge, and wrongly allowed the money to be taken out H
by Zauwiah and commenced proceedings against MFB, BBMB and Zauwiah. The cause of action relied upon by Bestari was in negligence whereby it alleged, *inter alia*, MFB and BBMB had employed less than active banking procedures and failed to adhere to the terms and conditions in the facility agreement. The High I
Court, in allowing the claim by Bestari against MFB and BBMB,

held *inter alia* that: (i) MFB was negligent in handing over the cheque to Zauwiah; and (ii) BBMB was negligent in opening the account in the name of Bestari. Nevertheless, the High Court apportioned the liability on the basis of 40% to be borne by MFB, 40% to be borne by BBMB and 20% to be borne by Bestari respectively. Hence, these appeals by MFB and BBMB against the judgment and apportionment of liabilities.

Held (allowing MFB's appeal and setting aside order of High Court with costs; allowing BBMB's appeal with costs and setting aside order of High Court)
Per Abdul Wahab Patail JCA delivering the judgment of the court:

(1) The learned judge did not entertain the submission on waiver of cl. 6.01 raised by MFB relying on the objection that it was not pleaded. The objection may hold merit and be sustained only if it is shown that the matter raised relied upon facts not pleaded and therefore the party making the objection did not have the opportunity of addressing the truth and accuracy of description of that fact. However, the term loan facility agreement was before the court and cl. 6 thereof provides "The Lender reserves the absolute right to waive any of the conditions precedent set out in this section ...". Had the learned judge addressed her mind correctly, she would not have merely accepted the objection and come to the conclusion to disallow the submission of waiver, because it was purely a question of law whether the beneficiary of a provision might forgo it. (paras 15, 26, 28 & 29)

(2) Exhibit D36 showing that Bestari had been paying the instalments for the facility since the disbursement was a computer generated document. The document was not accompanied by a certificate under s. 90A(2) of the Evidence Act 1950 and was thus inadmissible. (para 30)

(3) The learned trial judge had failed to take into consideration the evidence which, *inter alia*, showed that Zauwiah was the shareholder of Bestari, that the guarantors had knowledge of the disbursement of the loan and, despite discovering the misconduct of Zauwiah, had not reported about it. Had she done so, she would not have come to the conclusion that Bestari had proved its case under the tort of negligence

against MFB on the basis that handing over the cheque to Zauwiah constituted an act of negligence in the tort of negligence. MFB had, at all times, dealt with Zauwiah as the representative of Bestari and the directors were content that it be so. (paras 31 & 32)

(4) Too much weight was put on the failure to verify even with the imperfections in the signatures, and not enough weight was given to the facts and evidence before the court. Bestari was the author of its own misfortune, and even if it were not wholly responsible, it had effectively accepted the conduct of Zauwiah. Its failure to act promptly upon purported discovery in all probability made impossible and therefore denied opportunity to both MFB and BBMB to minimise losses. A party cannot approbate and reprobate, and still seek recovery for itself, as was the case here when Bestari and its guarantors proceeded to sue MFB and BBMB. (para 41)

Bahasa Malaysia *Translation Of Headnotes*

Emas Bestari Sdn Bhd ('Bestari') memperolehi pinjaman sebanyak RM500,000 daripada Mayban Finance Bhd ('MFB') yang dijamin oleh pengarah-pengarahnya ('penjamin-penjamin'). Cek bagi jumlah pinjaman diserahkan kepada satu Zauwiah Dahlan ('Zauwiah') ke dalam akaun Bank Bumiputra Malaysia Bhd ('BBMB') di bawah nama Bestari. Wang tersebut dikeluarkan dari akaun tersebut tiga hari kemudian. Bestari dan penjamin-penjamin menyatakan bahawa: (i) MFB telah secara salah menyerahkan cek bagi pinjaman tersebut kepada Zauwiah; dan (ii) BBMB telah, secara salah, membuka akaun bagi Bestari kerana ia adalah tanpa kuasa dan pengetahuan mereka, dan telah, secara salah, membenarkan wang tersebut dikeluarkan oleh Zauwiah dan memulakan prosiding terhadap MFB, BBMB dan Zauwiah. Kausa tindakan yang disandarkan oleh Bestari adalah kecuaian di mana ia mendakwa, antara lain, MFB dan BBMB telah menggunakan prosedur perbankan yang kurang aktif dan gagal mematuhi terma-terma dan syarat-syarat dalam perjanjian kemudahan. Mahkamah Tinggi, dalam membenarkan tuntutan oleh Bestari terhadap MFB dan BBMB, memutuskan, antara lain, bahawa: (i) MFB cuai dalam menyerahkan cek kepada Zauwiah; dan (ii) BBMB cuai dalam membuka akaun dalam nama Bestari. Walau bagaimanapun, Mahkamah Tinggi mengagihkan liabiliti atas dasar 40% dibayar oleh MFB, 40% dibayar oleh BBMB dan 20% dibayar oleh Bestari. Maka, rayuan-rayuan ini oleh MFB dan BBMB terhadap penghakiman dan pembahagian liabiliti.

Diputuskan (membenarkan rayuan MFB dan mengenepikan perintah Mahkamah Tinggi dengan kos; membenarkan rayuan BBMB dengan kos dan mengenepikan perintah Mahkamah Tinggi):
Oleh Abdul Wahab Patail HMR menyampaikan penghakiman mahkamah:

(1) Yang arif hakim tidak mempertimbangkan penghujahan berkaitan dengan penepian kl. 6.01 yang dibangkitkan oleh MFB dengan menyandar pada bantahan bahawa ia tidak diplidkan. Bantahan tersebut mungkin mempunyai merit dan boleh dikekalkan hanya jika ditunjukkan bahawa perkara yang dibangkitkan bersandar kepada fakta-fakta yang tidak diplidkan dan dengan itu pihak yang membuat bantahan tidak mempunyai peluang untuk mengulas tentang kebenaran dan ketepatan gambaran fakta tersebut. Walau bagaimanapun, perjanjian kemudahan pinjaman berkala ada di hadapan mahkamah dan kl. 6 tersebut memperuntukkan "The Lender reserves the absolute right to waive any of the conditions precedent set out in this section ...". Jika yang arif hakim mempertimbangkannya dengan betul, beliau tidak akan hanya menerima bantahan tersebut dan membuat kesimpulan untuk tidak membenarkan penghujahan penepian tersebut, kerana persoalan sama ada benefisiari sesuatu peruntukan boleh melepaskannya adalah persoalan undang-undang semata-mata.

(2) Ekshibit D36 yang menunjukkan bahawa Bestari telah membayar ansuran bagi kemudahan tersebut semenjak pengeluarannya adalah dokumen yang dikeluarkan oleh komputer. Dokumen tersebut tidak dikepilkan dengan sijil di bawah s. 90A(2) Akta Keterangan 1950 dan dengan itu tidak boleh diterima.

(3) Yang arif hakim gagal mempertimbangkan keterangan yang, antara lain, menunjukkan bahawa Zauwiah adalah pemegang saham Bestari, bahawa penjamin-penjamin tersebut mempunyai pengetahuan mengenai pembayaran pinjaman dan, walaupun membuat penemuan tentang salah laku oleh Zauwiah, tidak membuat laporan mengenainya. Jika beliau telah berbuat demikian, beliau tidak akan membuat keputusan bahawa Bestari telah membuktikan kesnya di bawah tort kecuaian terhadap MFB atas dasar bahawa penyerahan cek kepada Zauwiah menjadikan ia satu tindakan kecuaian dalam tort

kecuaian. MFB telah, pada setiap masa, berurusan dengan Zauwiah sebagai wakil Bestari dan pengarah-pengarahnya berpuashati dengan keadaan sedemikian. A

(4) Beban yang tinggi diletakkan atas kegagalan mengesahkan walaupun dengan ketidaksempurnaan dalam tandatangan dan beban yang tidak mencukupi diberikan kepada fakta dan keterangan di hadapan mahkamah. Bestari, dengan sendirinya adalah bersalah, dan walaupun ia tidak bertanggungjawab sepenuhnya, ia telah secara efektif menerima tindakan Zauwiah. Kegagalannya untuk bertindak dengan segera selepas membuat penemuan tersebut dalam kesemua keadaan menjadikannya mustahil dan menafikan peluang kepada MFB dan BBMB mengurangkan kerugian. Sesuatu pihak tidak boleh aprobat dan reprobat, dan pada masa yang sama memohon ganti rugi bagi dirinya, seperti kes ini apabila Bestari dan penjamin-penjaminnya meneruskan untuk menyaman MFB dan BBMB. B C D

Case(s) referred to:
Donoghue v. Stevenson [1932] AC 562 ***(refd)***
Superintendent of Lands and Surveys, 4th Division & Anor v. Hamit Matusin & Ors [1994] 3 CLJ 567 SC ***(refd)*** E

Legislation referred to:
Civil Law Act 1956, s. 3(1)
Evidence Act 1950, s. 90A(2)

(Civil Appeal No: W-02-2890-2010) F
For the appellant - Arham Rahimy Hariri; M/s Azim, Tunku Farik & Wong
For the 1st respondent - Ram Karpal Singh (Sangeet Kaur Dev with him); M/s Karpal Singh & Co
For the 2nd respondent - Eng Tiong Mei (Low Kok Hee with him); M/s Jal & Lim G

(Civil Appeal No: W-02-2886-2010)
For the appellant - Eng Tiong Mei (Low Kok Hee with him); M/s Jal & Lim
For the 1st respondent - Ram Karpal Singh (Sangeet Kaur Dev with him); M/s Karpal Singh & Co
For the 4th respondent - Arham Rahimy Hariri; M/s Azim, Tunku Farik & Wong H

[Appeal from High Court, Kuala Lumpur; Civil Suits No: S2(6)-22-686-1998, S-22-835-2010 & High Court, Shah Alam; Civil Suit No: MT5-22-533-1997] I

Reported by S Barathi

A

JUDGMENT

Abdul Wahab Patail JCA:

[1] Civil Appeal No: W-02-2886-2010 is the appeal by Mayban Finance Bhd (MFB) against the decisions of the High Court on 23 September 2010 to enter judgment of liability in Civil Suit No: S4(6)-22-686-1998 and apportionment of 40% liability against MFB.

[2] Civil Appeal No: W-02-2890-2010 is the appeal by Bank Bumiputra Malaysia Bhd (BBMB) against judgment and apportionment of 40% liability for damages to be assessed entered against it in the same Civil Suit No: S4(6)-22-686-1998.

[3] The above Civil Appeals No: W-02-2886-2010 and W-02-2890-2010 were heard together.

Background

[4] MFB provided a loan of RM500,000 to Emas Bestari Sdn Bhd ("Bestari") under a term loan facility agreement, with guarantees by its directors Ablah bin Othman and Hezlin Hezri bin Ablah (the guarantors) and the cheques for which loan sum was released on 28 October 1995 to Zauwiah bte Dahlan (Zauwiah).

[5] The cheque for the loan sum was paid by Zauwiah into an account in BBMB under the name of Bestari. The money was taken out of the account three days later. Bestari and the guarantors say that:

(i) MFB wrongly released the cheque for the loan to Zauwiah; and

(ii) BBMB wrongly opened the account for Bestari as it was without their authority and knowledge, and wrongly allowed the money to be taken out by Zauwiah.

[6] Bestari commenced proceedings in Kuala Lumpur Civil Suit No: S4(6)-22-686-1998 against MFB, BBMB and Zauwiah bt Dahlan (Zauwiah) under the tort of negligence on the part of MFB and BBMB.

B C D E F G H I

[7] An action was earlier commenced by MFB against Bestari, and its guarantors Ablah bin Othman and Hezlin Hezri bin Ablah under Shah Alam Civil Suit No: MT5-22-533-1997. That civil suit was transferred to Kuala Lumpur and registered as S-22-835-2010 and consolidated with the action commenced by Bestari.

[8] Before trial, judgment in default was entered against Zauwiah. The civil suit by MFB was dismissed on the ground that MFB failed to prove the amount outstanding as at 11 August 1997 as claimed. There is no appeal by MFB against the dismissal.

The High Court

[9] In the High Court, Bestari sought the following orders against MFB, BBMB and Zauwiah bte Dahlan:

(a) Gantirugi am termasuk teladan;

(b) Gantirugi khas sebanyak RM1,032,494.60;

(c) Kos tindakan ini;

(d) Faedah terhadap keseluruhan amaun penghakiman disini pada taraf dan untuk jangkamasa yang Mahkamah Mulia ini fikir patut dan sesuai;

(e) Apa jua perintah dan/atau relif lain yang dianggap sesuai dan wajar oleh Mahkamah yang Mulia ini.

[10] The causes of action relied upon by Bestari was negligence in:

(i) MFB employing less than active banking procedures and failure to adhere to terms and conditions on the part of MFB in:

(a) failing to adhere to cls. 3.03, 6.01(b) and 6.01(h) of the facility agreement of 28 October 1995; and

(b) releasing the loan sum to Zauwiah bte Dahlan before Bestari supplied to MFB specimen signatures of those authorised to sign on behalf of Bestari.

(ii) BBMB employing less than active banking procedures in:

(a) failing to verify the application to open the account 010013066091 on 24 October 1995; and

(b) its servants, En Zabidi Mohamed Akib and En Rusli Dollah, for whose acts it is vicariously liable, failing to verify that directors of Bestari had signed the forms to open the account before giving approval.

[11] At the end of trial, the High Court ordered:

(i) The claim by Bestari in Civil Suit No: S2(6)-22-686-1998 was allowed against MFB and BBMB with costs and damages to be assessed by the Senior Assistant Registrar; and

(ii) Liability and costs to be borne as follows:

Bestari	20%
MFB	40%
BBMB	40%

[12] Bestari as plaintiff did not appeal. MFB and BBMB appealed.

[13] The core of the reasoning of the High Court was summed by the High Court as follows:

> At the end of the trial I held that both MFB and BBMB were negligent. MFB was negligent in handing over the cheque to Zauwiah whilst BBMB was also negligent in opening the account in the name of EB and thereby allowing the cheque issued by MFB in the name of EB to be banked in and later cash taken out by Zauwiah. However, I apportioned the liability, 40% to be borne by MFB and 40% to be borne by BBMB. The other 20% is to be borne by EB itself.

[14] The High Court found there was negligence as follows:

(i) MFB was negligent in handing over the cheque to Zauwiah; and

(ii) BBMB was also negligent in opening the account in the name of EB.

[15] But, instead of giving its reasons why MFB was negligent in handing over the cheque to Zauwiah, the High Court added other basis for its finding of negligence:

MFB granted the Term Loan Facility to EB and the Agreement is marked as Exhibit "P-2". Clause 6.01 (h) of the Agreement stipulates that "the Borrower shall have furnished to the Lender specimen signatures of persons authorized to sign on behalf of the Borrower for the purpose of the Facility.

However there is evidence that there was non-compliance of the said Clause. Instead, DW1 tried to justify why it was so which would be irrelevant. The fact is that the condition precedent was not complied with. MFB also tried to say that it had waived this condition but this was not pleaded. Therefore it cannot be raised. Failure to obtain the specimen signatures enabled Zauwiah who was not given authority by EB to collect the cheque and deal with it.

First Principles

[16] So as not to be led astray by the everyday common notions of what constitutes "carelessness", a synonym for "negligence", it is necessary to bear in mind the cause of action is in the tort of negligence. A tort is a civil wrong. The law of torts encompasses a range of civil wrongs such as negligence, defamation, nuisance, trespass and passing off. It involves remedy where injury or damage is caused to another. The liability is imposed on a person who intentionally or negligently acts or fails to act in a particular manner. Although this implies that to be liable the person committing the tort, ie, the tortfeasor, must be culpable, employers may be held liable for the acts of their employees under the principle of vicarious liability.

[17] The tort of negligence was established by the House of Lords in *Donoghue v. Stevenson* [1932] AC 562 HL. Lord Atkins explained in *Donoghue v. Stevenson* (*supra*) when the duty arises:

> The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, 'Who is my neighbour?' receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be: persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

[18] In the same case, Lord Macmillan had this to say:

> The law takes no cognizance of carelessness in the abstract. It concerns itself with carelessness only where there is a duty to take care and where failure in that duty has caused damage. In such circumstances carelessness assumes the legal quality of negligence and entails the consequences in law of negligence.

[19] The tort of negligence is not concerned with the ordinary notions of carelessness and for liability to arise there must be an assessment of the circumstances to determine whether a duty of care had arisen between the plaintiff and the defendant.

[20] An action under the tort of negligence involves establishing the following elements:

(i) A duty of care owed by the defendant to the plaintiff;

(ii) A breach of that duty by the defendant;

(iii) The breach caused the damage; and

(iv) The damage is a foreseeable and not a too remote consequence.

[21] It should also be borne in mind that being part of the common law, the law of torts applicable in Malaysia is as provided by s. 3(1) of the Civil Law Act 1956 (Revised 1972) Act 67.

[22] Bearing this in mind, we examine the grounds of judgment in the light of the appeals.

The MFB Appeal

[23] Bestari had relied upon cls. 3.03, 6.01(g) and 6.01(h) of the term loan facility agreement dated 28 October 1995:

> 3.03 Procedures for Disbursement of the Facility
>
> The Facility shall be disbursed by the Lender to the Borrower or on behalf of the Borrower at the time and in the manner set out in the letter of offer dated 17th October, 1995 after the execution and registration of this Agreement and upon the observance and performance by the Borrower of the covenants contained in clause 6.01 hereof to be observed and performed by the Borrower.

6.01 Conditions Precedent

The following events are specified as conditions precedent to the disbursement of any part of the Facility. The obligation of the lender to make any disbursement of the Facility is subject to the fulfilment, in the manner satisfactory to the Lender, prior to the making of any disbursement, of the following conditions:

(g) the guarantee and all other security documents shall have been duly executed and stamped;

(h) the borrower shall have furnished to the Lender specimen signatures of persons authorised to sign on behalf of the Borrower for the purpose of the Facility.

[24] These provisions are clearly included for the benefit of the lender, and must be satisfied by the borrower. Any protection it affords the borrower is incidental. But it remains that these are provisions that the lender may exempt the borrower from having to comply with. In other words, it may waive compliance with these conditions precedent.

[25] As the grounds of judgment extracted at para. 15 above show, it was held the submission of waiver was not entertained because it had not been pleaded. The objection it had not been pleaded was accepted.

[26] The objection that a matter has not been pleaded is not the ground for the objection. It is a general description of the nature of the objection. But whether the objection is sustainable is decided by the grounds for the objection. Such grounds arise from the nature of the matter. Hence, if the matter raised is only a question of law, it need not be pleaded. Even if the matter is a question of fact, but the evidence relied upon in respect of it are already admitted in evidence before the court, which means the other party is not taken by surprise. Protestations or affectations of surprise "because it was not pleaded" in such case holds no merit. Only if it is shown that the matter raised relied upon facts not pleaded and therefore the party making the objection did not have the opportunity of addressing the truth and accuracy of description of that fact, may the objection hold merit and be sustained. In *Superintendent of Lands and Surveys, 4th Division & Anor v. Hamit Matusin & Ors* [1994] 3 CLJ 567, then Peh Swee Chin FCJ held:

A In the instant case, the defendants merely pleaded a denial of the acquisition of native customary rights claimed by the plaintiffs. This is not enough. They would have to say why; failure to do so would make any evidence of the reason for the denial objectionable at the option of the plaintiffs.

B The underlying well-known rationale for requiring such material facts to be pleaded is, of course, to prevent the opposing party from being taken by surprise by evidence which departs from pleaded material facts, for such evidence if allowed, will prejudice and embarrass or mislead the opposing party.

C If a party is taken by surprise, he must object then and there at the point of time when such evidence emerges, for such evidence to be disregarded by the Court, and the Court will then uphold such timely objection. The Court will generally however grant an adjournment if requested, on suitable terms as to costs etc. for D the pleading to be amended by the party seeking to adduce such evidence. One must bear in mind the need for an orderly adversary system of a Court trial, not a chaotic harangue in a market place.

E A party is not taken by surprise when the circumstances actually indicate so, e.g. when such evidence is the very evidence sought to be relied on by him from the outset, or when he fails to object to such evidence then and there as this Court now seeks to emphasize.

F **[27]** After elaborating on the point further, His Lordship concluded:

Therefore a Court inevitably ought to enquire, when there is failure to object to such evidence when it is adduced, whether it is such a radical departure, if not, it is a mere variation, G modification or a development, then the impropriety of admission of such evidence at variance with the pleadings is deemed to be waived and the defect in such pleadings cured.

[28] In this case, the term loan facility agreement was before the court and cl. 6 thereof provides: "The Lender reserves the H absolute right to waive any of the conditions precedent set out in this section. ...".

[29] The learned judge had failed to address her mind correctly. Had she done so, she would not have merely accepted the I objection and come to the conclusion she had made to disallow the submission of waiver, because it is purely a question of law whether the beneficiary of a provision may forgo it.

[30] We dismiss the submission by counsel for MFB that exh. D-36 shows that Bestari had been paying the instalments payment for the facility since the disbursement on 28 October 1995. That document is a computer generated document and was not admissible for the reason it was not accompanied by a certificate under s. 90A(2) of the Evidence Act 1950. That was the reason the claim by MFB was dismissed.

[31] The learned judge failed, on the evidence before the court:

(a) to take into consideration it was pleaded that Zauwiah was at all times a shareholder of Bestari and acted to assist Bestari to obtain approval for a loan of RM500,000;

(b) to consider while a purported share sale agreement was signed on 14 February 1996, there were two transfers of shares dated 10 October 1995 to Zauwiah of a total of 70,000 shares which would have made her, at the time the term loan facility agreement was entered into and cheque issued to Zauwiah, the majority shareholder of Bestari;

(c) to consider the authenticity of the purported share sale agreement dated 14 February 1996 when cl. 3.01 iii provides that "A third payment amounting to Ringgit Malaysia Thirty Thousand (RM30,000) only shall be paid by the purchaser to the vendors on or before the 25 January 1996;"

(d) to consider the testimony of PW1 Ablah bin Othman, director and first guarantor of Bestari where he admitted he was told by Zauwiah of payments made to service the loan at the end of 1995. In other words, he knew the loan had been disbursed, and he would obviously have known also at the time he had not complied with the conditions precedent in cl. 6 of the term loan facility agreement. He made no issue of it then; and

(e) to take into consideration that despite claiming to have discovered the misconduct of Zauwiah;

(i) PW1 and PW2 did not report to MFB, BBMB or police;

(ii) PW1 and PW2 instead entered into a share sale agreement with Zauwiah to take over Bestari;

A (iii) Zauwiah was appointed director and listed as manager with effect from 11 January 1996; and

(iv) PW1 and PW2 Hezlin Hezri bin Ablah, the two guarantors remained as directors until the end of 1996.

B **[32]** Had the learned judge considered these other evidence before the court, she could not have come to the conclusion that Bestari had proved its case under the tort of negligence against MFB on the basis that handing over the cheque to Zauwiah constituted an act of negligence in the tort of negligence. MFB C had at all times dealt with Zauwiah as the representative of Bestari and the directors were content that it be so, and their reaction on discovery of alleged misconduct was to sweep the purported misconduct under the carpet and allow her to take over the company.

D **[33]** We, therefore, allow the appeal by MFB and set aside the order of the High Court with costs.

The BBMB Appeal

E **[34]** With regard to the finding against BBMB that it was also negligent in opening the account in the name of Bestari, the High Court held as follows:

(i) D2W1, an officer with BBMB, conceded that the signatures F of the directors of (Bestari) in the resolution (exh. "P13") were obviously different from the signatures on p. 109 of B2 and that he was suspicious of the authenticity of the signatures given by Zauwiah but still proceeded to open the account;

G

(ii) D2W1 and D2W2 admitted that the application to open an account (exh. "P14") required the specimen signature of (Bestari) be furnished but yet both conceded the said requirement was not complied with;

H

(iii) D2W2 admitted that he did not comply with certain term and condition of BBMB, particularly cl. (b) p. 109 which both witnesses conceded was designed to safeguard both the borrower and bank from instance of forgery; and

I

(iv) Both D2W1 and D2W2 were well aware that the address given by Zauwiah at p. 109A, Bundle B2 was not that of (Bestari). But that of a tourist agency. Both of them also agreed, therefore, it was likely that the bank statements of BBMB would not reach (Bestari) as a result, yet they approved Zauwiah's application to open the said account using the said address.

In fact it was virtually admissions by both D2W1 and D2W2 that they had ignored or failed to carry out what were directions to safeguard the P and the D2 itself.

...

Since an account was to be opened and later on opened in (Bestari's) name with BBMB, *albeit* by Zauwiah using forged documents, the bank owed a duty of care to (Bestari). If BBMB had followed the directions drawn up by BBMB to safeguard the interest of the bank and clients like (Bestari), the account would not have been opened.

Under the circumstances, there is without a doubt that BBMB was negligent.

...

[35] The claim against BBMB is also premised on negligence. It is trite law that to succeed, it behoves the plaintiff to prove the following:

(i) Existence of a duty to the plaintiff;

(ii) The defendant had breached that duty; and

(iii) Loss suffered was foreseeable.

[36] The case for Bestari is that BBMB employed less than active banking procedures in:

(i) failing to verify the application to open the account 010013066091 on 24 October 1995; and

(ii) that its servants, En Zabidi Mohamed Akib and En Rusli Dollah, for whose acts it is vicariously liable, failing to verify that directors of Bestari had signed the forms to open the account before giving approval.

[37] The reason forgers can succeed to open bogus accounts in the name of various companies is because, as per the evidence of En Zabidi Mohamed Akib (D2W1), it is not normal practice for the bank to obtain confirmation from the company when someone makes an application purporting to be for a company. While it may seem trite wisdom that such scams could be avoided by verifying with the company, the answer may be found as follows:

(i) Who do you ask for the contact of the company? The person who made the application;

(ii) What is the probability that the person purporting to represent the company is a fraudster? It does not happen all the time; and

(iii) What is the probability that a representative of a company would defraud the company? It does not happen all the time.

[38] In other words, even if the person purporting to represent the company is a fraudster or not, he would have made sure the contact number he gives is to a person who will confirm the application is genuine. Companies make applications through a human representative. There is no basis to take judicial notice that fraud is so endemic in banking account applications that prudent business practice requires every application to be verified. It would slow down business as time and cost is consumed to check and verify. Of course when an application is found to be fraudulent subsequently, the man in the street may say the bank was negligent in not making verification. But that is wisdom after the event. In law, the material time to be taken into consideration is the time the application was made. Taking it in context the failure to verify is at worst an error of judgment.

[39] Likewise, a forger would ensure the signatures are as perfect as possible, while everyone is aware signatures do vary with time of day, whether one is standing or sitting and even one's state of mind when making the signature.

[40] In our view, too much weight was put on the failure to verify even with the imperfections in the signatures, and not enough weight was given to the fact and evidence before the court that:

(i) it was pleaded that Zauwiah was appointed to represent Bestari;

(ii) the cheque was paid into the Bestari account that is now purported to be without knowledge or authority of PW1 and PW2 on 28 October 1995 and the money withdrawn two days later, she was, as pleaded, at all times a shareholder of Bestari and the evidence shows share transfers dated 10 October 1995 of 70% of the shares of Bestari to Zauwiah;

(iii) PW1 admitted he was told by Zauwiah at the end of 1995 payment was made to MFB because the loan sum had been released, when he knew that he had not complied with the conditions precedent;

(iv) upon the purported discovery of the fraud by Zauwiah, neither Bestari nor PW1 or PW2 made any police report or informed MFB and BBMB, but entered into a share sale agreement with Zauwiah under which she would buy over all of the shares in Bestari, contradicting the share transfers of 10 October 1995;

(v) PW1 and PW2 remained as directors until the end of 1996; and

(vi) police reports were lodged in 1997 only after notices of demand were issued in 1997 by MFB's solicitors.

[41] If all these were taken into consideration and given the proper weight, it shows that in all the circumstances Bestari was the author of its own misfortune, and even if it were not wholly responsible, it had effectively accepted the conduct of Zauwiah. Its failure to act promptly upon purported discovery in all probability made impossible and therefore denied opportunity to both MFB and BBMB to minimise losses. A party cannot approbate and reprobate, and still seek recovery for itself, as is the case here when Bestari and its guarantors proceed to sue MFB and BBMB in 1998.

[42] We conclude that the learned judge had erred and that the order of the High Court ought to be set aside.

[43] Accordingly, we allow the appeal with costs and set aside the order of the High Court against BBMB.